Supreme Court, U.S.
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No. 01-966

IN THE

Supreme Court of the United States

FRANK O'BANNON, in his official capacity as Governor of Indiana,

Petitioner,

v.

INDIANA CIVIL LIBERTIES UNION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF THE PETITION

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688

QUESTION PRESENTED

Whether the Establishment Clause permits the government to display the Ten Commandments to memorialize the role the Commandments have played in the development of the rule of law and of the American legal system.

REPLY IN SUPPORT OF THE PETITION

1. Respondents have failed to negate the existence of a fundamental conflict among the federal circuits and a state supreme court on the permissibility of government Ten Commandments displays. Indeed, Respondents concede the existence of such a conflict, but urge that it is not "significant" or "meaningful" enough to justify certiorari. Opp. 20, 22, 24. That is not the case.

To begin, Respondents do not deny that *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973), is diametrically in conflict with this case. Instead, Respondents merely question *Anderson*'s continuing vitality. Opp. 21. But the Tenth Circuit itself reconfirmed *Anderson*'s vitality in *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997), stating, "We are not at liberty to overrule or disregard the precedent of an earlier panel absent *en banc* reconsideration or a superseding contrary decision of the United States Supreme Court." *Id.* at 912 n.8. Also, lower courts within the Tenth Circuit continue to enforce *Anderson*. *See Summum v. City of Ogden*, 152 F. Supp. 2d 1286, 1294 (D. Utah 2001) ("*Anderson* . . . is still good law and this Court is disciplined and bound by *Anderson*. Consistent with *Anderson*, this Court holds that the City of Ogden did not violate the Establishment Clause by adopting and displaying the 'Ten Commandments' monument donated by the Eagles."). Further, any uncertainty about *Anderson* only underscores the need for this Court to intercede here and settle the matter nationally.

With respect to *State of Colorado v. Freedom from Religion Foundation, Inc.*, 898 P.2d 1013 (Colo. 1995) (en banc), Respondents spend nearly two pages describing facts about that case, only to highlight the similarities between it

and this case. Both involve state government displays of the Ten Commandments; both displays would be on state capital grounds; and both state capital grounds are covered with other historical statues and monuments. Respondents attempt to distinguish *Colorado* simply because the monument in this case may be easier to spot. But there is nothing in the decision below—or in the *Colorado* decision—to suggest that either court would have reached a different result had the facts been so insignificantly altered.

Indeed, the arguable uniqueness of the holiday displays at issue in *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), did not impede certiorari. To the contrary, the Court reviewed those cases because they presented facts and issues "essentially like" those found in displays across the country. *Lynch*, 465 U.S. at 671. The presence of a single essential ingredient—the government's desire to display the Ten Commandments on government property—may, in fact, mean that the Court's decision in this case would resolve a substantial volume of outstanding and future litigation. Certainly, Respondents are wrong to suggest that the Court should never grant certiorari in cases such as this because minor facts would always vary.

2. Respondents also fail to undermine the fact that a decision from this Court would provide necessary guidance in a vast number of cases around the country. As shown in the petition (Pet. 11-12), there are already at least *seventeen* government Ten Commandments display cases pending, with the possibility of dozens, scores, or even hundreds more coming down the pike. Indeed, Respondents acknowledge, as they must, that the issue is widespread and recurring. Opp. 23-24. But with fundamental conflicts lurking in the federal circuits and a state supreme court, pending and future

Ten Commandments display cases cannot be resolved in any consistent way without the Court's guidance. There is no better vehicle for providing such guidance than this case, and no better time to provide it than now.

3. In the end, Respondents' position is that the law is clear and that lower courts need only apply that clear law to facts. But even the district court below disagreed with that notion when it acknowledged that tackling this case was "no small assignment, given the profusion and confusion reflected in the case law and in Supreme Court precedent." Pet. App. 38a.

In truth, pitfalls in Establishment Clause doctrine await at every turn. *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is the seminal decision for Establishment Clause cases, but lower courts more often rely on a one-Justice concurrence from *Lynch* and a highly fractured decision in *Allegheny* that produced no majority for any single rationale underlying the results. Further, the *Lemon* framework may not apply at all with respect to government acknowledgements of religious heritage or historic traditions involving religion. *See, e.g., Marsh v. Chambers*, 463 U.S. 783 (1983). More recently, *Mitchell v. Helms*, 530 U.S. 793 (2000), produced two separate supporting rationales for the result, but neither garnered a majority vote. *Id.* at 801 (plurality opinion of Thomas, J.); *id.* at 836 (O'Connor, J., joined by Breyer, J., concurring in the judgment). And courts with Ten Commandments cases face even more confusion given the per curiam opinion in *Stone v. Graham*, 449 U.S. 39 (1980), which invalidated a public schoolroom display of the Ten Commandments, but which is "hardly controlling" in other contexts. *City of Elkhart v. Books*, 121 S. Ct. 2209, 2210 (2001) (Rehnquist, C.J., dissenting from the denial of certiorari). This woolly landscape has led one Justice to

posit that "[s]ubstantial revision of our Establishment Clause doctrine may be in order . . . ." *Allegheny*, 492 U.S. at 656 (Kennedy, J., concurring in the judgment in part and dissenting in part).

Perhaps the Second Circuit put it best when it observed that, "[i]n the wake of a number of fragmented Court [Establishment Clause] decisions over the past decade, the governing law remains in doubt." *DeStefano v. Emergency Housing Group., Inc.*, 247 F.3d 397, 405 (2d Cir. 2001). Nowhere is that doubt more apparent than with respect to the permissibility of government Ten Commandments displays. The lower courts are in conflict on this issue, and there are many cases pending, with many more to come. The Court should hear this case to provide much-needed national guidance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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